

**WITHERINGTON CONSTRUCTION  
CORP.****CONTRACT NO. V659C-604****VABCA-4722****VA MEDICAL CENTER  
SALISBURY, NORTH CAROLINA**

*Edward Witherington*, President, Witherington Construction Corp., Mobile, Alabama, for the Appellant.

*Stacey North Willis, Esq.*, Trial Attorney, and *Phillipa L. Anderson, Esq.*, Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

**OPINION BY ADMINISTRATIVE JUDGE ANDERS  
(Pursuant to Board Rule 12.3)**

This appeal arises under a contract in the amount of \$4,685,177 awarded by the Department of Veterans Affairs (VA or Government) on November 18, 1993 to Witherington Construction Corp. (WCC or Appellant) for renovation of the VA Medical Center in Salisbury, North Carolina.

The dispute involves a difference of interpretation of the contract requirements for removal of concrete pads. Appellant claims \$7,274 for alleged extra-contractual work ordered by the VA.

Appellant has elected to have its appeal processed under Board Rule 12.3, the "accelerated procedure," under which the decision of the Board will "be brief and contain only summary findings of fact and conclusions." The parties have elected to have the appeal decided on the record without a hearing pursuant to Board Rules 11 and 13. The record consists of the appeal file furnished by the Contracting Officer (CO) pursuant to Board Rule 4, as supplemented, consisting of 16 exhibits; the Complaint, with 12 attached exhibits; the Answer; and a brief by the Government. Appellant designated its Complaint as its brief but subsequently proffered a late reply to the Government's brief.

**SUMMARY FINDINGS OF FACT**

Demolition Plan 3A2, Drawing A-2, "Demolition and Floor Plans," shows the area relating to the Contractor's claim. The disputed area is enclosed within a line of dashes with arrows pointing to this line from the symbol "1" in a rectangle. That symbol is defined on the drawing under "Keyed Notes" as "CONCRETE PADS." The arrows could also reasonably be said to be pointing to (1) the area just in front of the vestibule and (2) the area on the north side of the courtyard (also enclosed by dotted lines). Within part of the disputed area there is a symbol for a tree.

The contract work to be performed was similar for both the East and West Wings of Building 11. Both areas involved the demolition of a vestibule, removal of concrete pads and the construction of new day rooms. Note 1 on the drawing required the removal of concrete pads. On the Demolition Plans for both wings, the symbol composed of a

rectangle enclosing the number "1" had arrows running to dashed lines which appear to prescribe the edges of slabs. With the benefit of hindsight, however, it is now evident that there is a latent ambiguity as to which side of the dashed line the slab is on, i.e., whether the slab is inside or outside the area in which the symbols appear. Drawing Note 3 stated that the Contractor was to verify all existing conditions. The solicitation did not appear to contain the "Site Investigation and Conditions Affecting the Work" clause usually found in Government Contracts.

The prospective bidders were given the opportunity to visit the site on August 26, 1993. Twenty-one contractors participated. Appellant's name does not appear on the sign-in sheet and it does not appear from the record that Appellant or any of its subcontractors attended. (R4, tabs 13-14; Affidavit of William R. Ward, the Contracting Officer's Technical Representative for the contract)

The concrete pads for which the Contractor seeks additional compensation were located in the courtyard outside of the vestibule on the west wing of Building 11. A reasonable site investigation of Building 11 would or should have revealed the location of the concrete pads. (Affidavit of William R. Ward) It is not evident from the record exactly how, at the time of bidding, the Contractor interpreted the extent of concrete pad removal.

The Contract was awarded to WCC on November 18, 1993. The Notice to Proceed was issued by the VA and received by Appellant on December 8, 1993. All work was to be accomplished within 645 calendar days. (R4, tabs 5-6)

The first indication of a problem with interpretation of the demolition provisions, as related to demolition of concrete, occurred well into performance of the Contract. On March 14, 1995, WCC wrote to the CO requesting a change order to compensate it for the removal of additional concrete as follows:

We have discovered on Sheet A-2, Demolition Plan of the West Wing the following discrepancy: Note 1 - Concrete Pad to be removed points to an area on the north side of this space that is in fact grass. The majority of this area is covered with concrete and is not noted to be removed. . . . There are 1,644 additional square feet of 4" thick concrete slab to be removed at the West Wing. . . .

(R4, tab 6)

By letter dated March 16, 1995, the Contracting Officer denied the Contractor's request for additional compensation, primarily citing the drawing note requiring that the Contractor verify all existing conditions.

On March 17, 1995, Appellant wrote to the CO requesting an appealable final decision on its claim for \$7,274 for removal of 1,544 square feet of 4" concrete. Among other arguments, the Contractor suggested that it should not be expected to perform a point-by-point comparison between the actual conditions at the site and the conditions represented in the bid documents (R4, tab 10)

The CO denied Appellant's claim by final decision dated July 25, 1995, stating as follows:

Based upon the way the drawings are drawn, it is reasonable to expect that a person having a good working knowledge of construction practices would interpret the drawings to be what the actual field conditions were.

If, however, the drawings were interpreted as you are trying to interpret them, *then you must apply that same interpretation to both ends of the building. In that case, the amount of concrete slabs to be removed is greater than the amount that was actually removed.* Therefore, I see no justification for approving a cost increase to the contract. (Emphasis added)

(R4, tab 12)

### DISCUSSION

In their arguments to the Board, the parties focus their attention on whether the conditions would have been observable on a pre-bid site visit and the consequences of failure to make such a visit. While interesting questions are presented by these arguments, particularly in the absence of a "Site Investigation and Conditions Affecting the Work" clause in the Contract, we need not address them in light of the following discussion.

The Appellant has studiously ignored the findings made by the Contracting Officer in its submission to the Board. It has offered no rebuttal nor does the record contain any evidence as to how it calculated the cost of concrete removal in its bid. All we have before us is a cost submittal for "extra" concrete removal at one end of the Building. Moreover, our own independent examination of the East and West Wing Demolition Plans confirms the Contracting Officer's position that, applying the Appellant's interpretation consistently to both ends, the actual amount of concrete to be removed is more than contemplated at the West Wing but less than contemplated at the East Wing. The combined effect is that the total amount of concrete actually removed by the Contractor is no greater than that which should have been expected under the Contractor's interpretation.

We agree with the Contractor that the usage of Note 1 to designate concrete pads to be removed is ambiguous at best. However, we find that even if we apply the Contractor's interpretation, it cannot prevail based on the findings above. The Contractor has failed to prove that it performed any additional work or that the Government received anything beyond that for which it had bargained. When a Contractor makes an affirmative claim against the Government, the ultimate burden of proof or persuasion is upon the Contractor, and the final evidentiary question is whether the claim is supported by substantial evidence and proven by a preponderance of evidence. A claim against the Government may not be allowed merely because it has been alleged. ***J.C. Edwards Contracting and Engineering, Inc.***, VABCA Nos. 1947, 1969, 85-2 BCA ¶18,068. And as we said in ***Sefco Constructors***, VABCA 2747, 93-1 BCA ¶ 25,438 at 126,802:

A party seeking an equitable adjustment acts at its peril, in a Rule 11 procedure, where it fails to provide the Board sufficient factual information, supported by affidavits or probative documentary evidence. *Jen-Beck Associates*, VABCA Nos. et. al., 87-2 BCA ¶19,831 at 100,322; *Spanjer Brothers, Inc.*, VABCA No. 1819, 84-1 BCA ¶16,926. As we articulated in *Spanjer*, "[a]n Appellant claiming additional compensation for claimed extra work must show with reasonable certainty wherein the extra work was performed. The burden is not sustained by general statements in Appellant's correspondence."

Accordingly, Appellant is not entitled to recover for its alleged extra costs incurred in removal of the concrete pads.

### DECISION

For the foregoing reasons the appeal is denied.

DATE: May 7, 1996

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DAN R. ANDERS  
Administrative Judge

I concur:

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MORRIS PULLARA, JR.  
Administrative Judge